



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION

FOF- 174325

PRELIMINARY RECITALS

Pursuant to petition filed May 11, 2016, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Milwaukee County Department of Human Services to disqualify [REDACTED] from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Friday, June 24, 2016 at 10:45 AM, at Milwaukee, Wisconsin.

The issue for determination is whether the petitioner intentionally violated the FoodShare program's rules.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

[REDACTED]

Milwaukee Enrollment Services
1220 W Vliet St
Milwaukee, WI 53205

ADMINISTRATIVE LAW JUDGE:

Michael O'Brien
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Milwaukee County who received FoodShare there in January 2013.
2. The respondent was issued a QUEST card that allowed him access to his monthly FoodShare allotment. QUEST cards are electronic benefit transfer cards that replaced food stamp coupon booklets.
3. The respondent debited his QUEST card for \$200 on January 9, 2013, at the [REDACTED] [REDACTED].
4. [REDACTED] was a licensed vendor of the United States Department of Agriculture Food and Nutrition Service, which enabled it to redeem QUEST cards.
5. [REDACTED] was classified as a mobile vendor and operated out of private vehicles. Between August 2010 and January 2013, [REDACTED] redeemed approximately \$778,000 in QUEST benefits from food stamp benefit recipients who were not purchasing food, but instead receiving cash for providing access to their QUEST benefits.
6. On or about February 15, 2013, [REDACTED], doing business as [REDACTED], pled guilty to a charge of unlawfully purchasing and redeeming FS benefits. He admitted that neither he nor [REDACTED] ever provided food in exchange for Quest benefits.
7. On May 18, 2016, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent intentionally transferred \$200 in FS benefits to [REDACTED] in exchange for cash payments.

DISCUSSION

Trafficking FoodShare benefits violates the program's rules. Wis. Stat. § 946.92(2g). It includes selling FoodShare benefits for cash. 7 CFR § 271.2; *see also* Wis. Stat. § 946.92(1)(dm)1. FoodShare recipients lose their eligibility if the department proves by clear and convincing evidence that they intentionally violated the program's rules; the penalty for the first violation is one year. 7 CFR §§ 273.16(e)(6) and (b)(1)(i). The Department seeks to disqualify the respondent for one year because it contends that he exchanged his FoodShare benefits for cash.

Clear and convincing is a middle level of proof that requires the Department to show that more than just a preponderance of the evidence supports its position but does not require it to eliminate all reasonable doubt, as it would have to in a criminal case:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true.

Kuehn v. Kuehn, 11 Wis.2d 15, 26 (1959)*Kuehn*, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 explains that this level of evidence must clearly have more convincing power than the opposing evidence, but it does not require absolute certainty:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

The *McCormick* treatise suggests that the standard “could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992). Thus, to find that the respondent intentionally violated the FoodShare program’s rules, the evidence must induce a firm conviction that he attempted to purchase FoodShare benefits and that he did so intentionally, although there may be a reasonable doubt that this is true. Intent is a subjective state of mind determined upon all of the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). A person is presumed to know and intend the probable and natural consequences of his actions.

The allegations against the respondent occurred as part of the [REDACTED] Distribution was a licensed FoodShare vendor operated by [REDACTED]. But he did not sell any food. Instead he purchased FoodShare benefits from others for less than their stated value and then redeemed those benefits. From August 2010 through January 2013, [REDACTED] redeemed approximately \$778,000 in benefits in this manner from FoodShare recipients. On February 15, 2013, [REDACTED] pleaded guilty to unlawfully purchasing and redeeming FoodShare benefits and admitted that he never provided food in exchange for the benefits.

The respondent’s debit card was redeemed for \$200 from [REDACTED] Distribution on January 9, 2013. Due to the nature of this illicit business, the most reasonable explanation is that whoever redeemed the card, like the others who used their cards there, received cash for this transaction. The respondent testified that he got out of prison in January 2012, that he doesn’t recall using the card at [REDACTED] Distribution Center, but that he takes full responsibility for what happened. He could not name anyone else who may have used his card without his permission, and, if he temporarily misplaced the card, no one else could use it without knowing the PIN. The most reasonable explanation is that he used the card at [REDACTED], feels bad about it because he is trying to turn his life around, but does not feel bad enough to admit he used it. The evidence establishes that it is highly probable that he exchanged his FoodShare benefits for money at [REDACTED]. This establishes by clear and convincing evidence that he intentionally violated FoodShare program rules. Because this was his first violation, the department correctly seeks to disqualify him from the FoodShare program for one year.

CONCLUSIONS OF LAW

1. The respondent intentionally violated the FoodShare program rule specifying that a FoodShare recipient shall not knowingly transfer food coupons except to purchase food.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify him from the program for one year, effective the first month following the date he receives this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

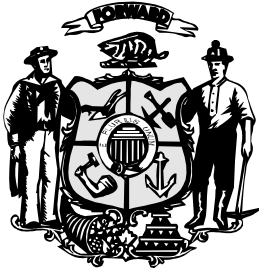
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 8th day of July, 2016

\s _____
Michael O'Brien
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on July 8, 2016.

Milwaukee Enrollment Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability
[REDACTED]